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ELYA DESIGNS SDN BHD

v.

MAHKAMAH PERUSAHAAN MALAYSIA & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[JUDICIAL REVIEW NO: R2-25-334-07]
14 MAY 2010

C ***LABOUR LAW:*** *Employment - Constructive dismissal - Burden of proof - Elements to be proven - Employee to act with promptness - Unilateral decision by employer to vary terms and condition of employee's contract of employment - Whether employer in breach of contract of employment - Failure by employee to immediately repudiate contract -* D *Whether employee deemed to accept variation*

LABOUR LAW: *Employment - Constructive dismissal - Variation of employee's salary (30%) from monthly salary to hourly rate - Whether amounted to fundamental breach/repudiation of contract of employment -* E *Discretion of company to reorganise business, whether in issue - Whether employer had just cause for conversion of salary*

LABOUR LAW: *Industrial Court - Duty of court - Duty to act according to equity and good conscience - Whether employee came to court with clean hands - Claim for constructive dismissal - Erratic work* F *attendance and poor performance of employee - Whether industrial court prevented from giving remedy*

The second respondent was employed with the applicant as a Chief Interior Designer. When the second respondent joined the G applicant, they were on the verge of securing a KLSE project and this was one of the major reasons he was employed. The second respondent was to be entitled to an incentive sharing scheme for the KLSE Project. The incentive sharing scheme was a major inducement for the second respondent to join the applicant. Later, H the applicant's Managing Director (COW1) proposed that the second respondent performed miscellaneous design works on and as required basis for an hourly rate. The second respondent did not agree to the said proposal. However, *vide* a letter dated 12 February 1998, the second respondent was informed that I effective 1 March 1998, his salary was to be paid based on an hourly rate of RM31.25 per hour. He was also informed that his

job scope would cover marketing to assist in bringing in new works for the applicant, miscellaneous design works as and when required and the Heritage Hotel detail design development. The second respondent was also informed that he was no longer required to report for duty and would be summoned on and as required basis. The second respondent was told to remove all his personal belongings and surrender the office keys immediately. The second respondent wrote a letter dated 20 March 1998 to the applicant stating that the applicant had changed his employment status thereby breaching the fundamental terms and conditions of his employment. In the same letter, the second respondent also stated that should the applicant refuse to respond to his letter within five days, he would consider himself constructively dismissed. The applicant did not respond and the second respondent considered himself constructively dismissed with effect from 25 March 1998. *Vide* Award No: 1986 of 2007, the first respondent found that the second respondent was constructively dismissed and that the applicant had not succeeded in proving on a balance of probabilities that the dismissal was with just cause or excuse. Hence this application by the applicant for an order of *certiorari*, *inter alia*, to quash the award. The issue to be determined was whether the applicant had breached the fundamental terms that went to the root of the second respondent's contract of employment by its unilateral decision to change the terms and condition of his employment.

Held (allowing the application with costs):

(1) In a claim of constructive dismissal, the burden of proof lies on the employee on a balance of probabilities to prove: (i) the applicant, by its conduct, had breached a term of his contract of employment or had evinced an intention no longer to be bound by it; (ii) the breach was a fundamental that goes to the root of the contract; (iii) he left in response to that breach and not for some unconnected reason; and (iv) he did not unreasonably delay in terminating the contract of employment otherwise he may be deemed to have waived the said breach. (paras 14 & 15)

(2) The learned Chairman had made an error in imposing a burden of proof on the applicant that the second respondent had been dismissed with just cause or excuse. There is a two stage

A inquiry into constructive dismissal that the Industrial Court must take. The court must first decide whether there has been a dismissal which requires the employee to prove that the employer's conduct led him to terminate the employment relationship. If the employee discharges this burden of proof, B the employer is required to call the relevant evidence to rebut that the dismissal was for just cause and excuse. This does not necessarily mean that a burden is placed on the employer to prove, on balance of probabilities, that the claimant had been dismissed with just cause or excuse. (para 18)

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(3) For a complaint of constructive dismissal to succeed, it is essential that the employee should act with promptness. It is fatal to a claim based on constructive dismissal if there is undue delay in responding to the changes that were imposed D by the employer or generally, in reacting to the repudiatory conduct of the employer. (para 19)

(4) The second respondent did not repudiate the contract in October 1997. Instead, he affirmed and accepted it for five months and his affirmation of the variation must be deemed E complete. The letter dated 12 February 1998, merely formalized the practice over the past five months, of paying salary on an hourly rated basis. Therefore, since the second respondent did not act immediately to repudiate his contract, his action must be viewed as his electing to accept the F variation. (para 20)

(5) The applicant had just cause for the conversion of salary. The learned chairman of the Industrial Court had failed to take into account the facts that the second respondent had stopped G coming to work regularly by the time the letter was issued. The applicant did not take an extreme position *vis-a-vis* the second respondent's absenteeism. COW1 had attempted to renegotiate the second respondent's terms and conditions of service. His poor performance and the economic crisis were H both driving factors behind the need to do something about the second respondent. In any event, the hourly rate amendment to the second respondent's salary would have returned a salary in excess of the second respondent's previously expressed contractual monthly salary if the second I respondent had attended work. (paras 25 & 26)

(6) The court has always respected a company's exercise of its prerogative to devise means to improve its operations. Thus, courts have held that management is free to regulate, according to its own discretion and judgment, all aspects of employment, including hiring, work assignments, working methods, time, place and manner of work, processes to be followed, supervision of workers, working regulations, transfer of employees, work supervision, lay off of prerogative, whenever exigencies of the service so require, to change the working hours of its employees. (paras 28 & 29)

(7) Due to the second respondent's own erratic attendance and anxiety over the incentive sharing scheme, his attendance and performance became questionable. If he who comes to equity must come with clean hands, then certainly, the second respondent must be prevented from obtaining a remedy from the first respondent, the Court of Equity and Good Conscience. (para 30)

Case(s) referred to:

Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh [2000] 4 CLJ 77 CA ***(refd)***

Bayer (M) Sdn Bhd v. Anwar Abd Rahim [1996] 2 CLJ 49 HC ***(refd)***

Booi Kim Lee v. YB Menteri Sumber Manusia, Malaysia & Anor [1999] 4 CLJ 121 HC ***(refd)***

Council of Civil Service Unions v. Minister For the Civil Service [1985] AC 374 ***(refd)***

Diethelm Malaysia Sdn Bhd v. Choong Pak Choy [1997] 2 ILR 423 ***(refd)***

Edwards v. Surrey Police [1999] IRLR 456 ***(refd)***

Holland v. Glendale Industries Ltd [1998] ICR 493 ***(refd)***

Kontena Nasional Bhd v. Hashim Abd Razak [2000] 8 CLJ 274 HC ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***

Malayan Banking Bhd v. Association Of Bank Officers Peninsular Malaysia & Industrial Court [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC ***(refd)***

Medicplas Industries Sdn Bhd v. Eldophol Pereiara, Hunt v. British Railway Board [1979] IRLR 295 ***(refd)***

Moo Ng v. Kiwi Products Sdn Bhd Johor & Anor [1998] 3 CLJ 475 HC ***(refd)***

Pexxon Sendirian Berhad And Sia Qui Yau, Johore [1989] 2 ILR 235 ***(refd)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Selangor Medical Centre v. Zainal Abidin Md Tamami [2002] 2 ILR 527 ***(refd)***

A *Southern Bank Bhd v. Ng Keng Lian & Anor [2002] 2 CLJ 514 HC* ***(refd)***
Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor [1998] 1 LNS 258 HC ***(refd)***
Western Excavating (ECC) Ltd v. Sharp [1978] 1 All ER 713 ***(refd)***
William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 CA
B ***(refd)***

For the applicant - Renuka Balasubramaniam; M/s T Balasubramaniam
For the 2nd respondent - Ravindra Murugavell; M/s Murugavell Arumugam & Co

C *Reported by Amutha Suppayah*

JUDGMENT

D **Mohd Zawawi Salleh J:**

Introduction

[1] This case concerns an application for judicial review by Elya Design Sdn Bhd ('the applicant') for an order of *certiorari*, *inter*
E *alia*, to quash the Award No. 1986 of 2007 dated 25 September 2007 handed down by the Industrial Court ("the first respondent").

[2] After considering the submissions filed by both parties, the
F court allowed the application with costs.

Fact Of The Case

[3] To ensure a prescriptive of this case, some antecedent events leading to this application are set out in detail as follows:

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(a) Encik Noor Effendi bin Mohd Ali ("the second respondent") commenced employment with the applicant as a Chief Interior Designer effective 22 July 1996 at a monthly salary of RM3,000. When the second respondent joined the applicant,
H they were on the verge of securing the KLSE project and this was one of the major reasons he was employed. During the negotiation stage prior to the second respondent's appointment, he was assured that he would be entitled to an incentive sharing scheme for the KLSE Project.

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(b) As Chief Interior Designer, the second respondent was reporting to the Managing Director, Puan Elya Adnan who was witness (COW1) during the trial at the Industrial Court. A

(c) After working about six months on the KLSE Project, the applicant managed to quantify the minimum construction cost for the said Project and based on the 3% commission that was agreed upon, the second respondent was due to receive the sum of RM150,000. The incentive sharing scheme was a major inducement for the second respondent to join the applicant. The applicant however did not pay the entire RM150,000 to the second respondent as promised despite the said project being successfully completed. He was instead only given RM40,000 in August 1997 and another RM40,000 in September 1997. B C

(d) The second respondent wrote a letter dated 31 October 1997 enquiring about the remaining sum of RM70,000 due to him but he never received a response. Instead, *vide* a letter dated 1 November 1997, the second respondent was confirmed as Chief Interior Designer and his monthly salary was revised to RM5,000. The said letter also confirmed that he was entitled to an incentive sharing scheme. In early 1998, the applicant paid the second respondent a further RM50,000 for the KLSE Project. As a result, the remaining sum owed to him was RM20,000. D E F

(e) On 11 February 1998, COW1 approached the second respondent and proposed that he performs miscellaneous design works on and as required basis for an hourly rate. The second respondent did not agree to the said proposal. *Vide* a letter dated 12 February 1998, the second respondent was informed that effective 1 March 1998, his salary was to be paid based on an hourly rate of RM31.25 per hour. He was also informed that his job scope would cover marketing to assist in bringing in new works for the applicant, miscellaneous design works as and when required and the Heritage Hotel detail design development. G H

(f) In early March 1998, one Ms Jessie, who was a witness (COW3) for the applicant during the trial at the Industrial Court, informed the second respondent that COW1 had given I

instruction that he was no longer required to report for duty and would be summoned on and as required basis. The second respondent was also told to remove all his personal belongings and surrender the office keys immediately.

(g) As the second respondent could not contact COW1 on several occasions, he wrote a letter dated 20 March 1998 to the applicant stating that the applicant had changed his employment status thereby breaching the fundamental terms and conditions of his employment. In the same letter, the second respondent also stated that should the applicant refuse to respond to his letter within five days, he would consider himself constructively dismissed.

(h) Since the applicant refused to respond or remedy the breaches it had committed, the second respondent was compelled to consider himself constructively dismissed with effect from 25 March 1998. Hence, this application.

First Respondent's Award

[4] *Vide* Award No:1986 of 2007, the first respondent found that the second respondent was constructively dismissed. The first respondent also found that the applicant had not succeeded in proving on a balance of probabilities that his dismissal was with just cause or excuse. As a result of this finding, the applicant was ordered to pay a sum of RM89,000 as backwages and compensation *in lieu* of reinstatement within 30 days of the date of the award.

Applicant's Submission

[5] Learned counsel for the applicant contends that the first respondent's decision dated 25 September 2007 is infected by errors of law, misdirection and irrationality. According to learned counsel for the applicant, at the outset, it may appear that the applicant had breached serious and fundamental terms of the contract of service resulting in a constructive dismissal of the second respondent, but closer scrutiny reveals that with regards to the incentives, the actual breach had not taken place. As regards the conversion of the second respondent's salary from monthly to hourly rate, the second respondent had elected to affirm the breach which in any event was with just cause.

[6] Learned counsel for the applicant further submits that the basic requirements of a claim of constructive dismissal had not been made out in this instant case. To support his submission, learned counsel for the applicant referred to "Bryn Perrin's Industrial Relations and Employment", where the learned author summarised the law on constructive dismissal as follows:

> In order for the employee to be able to claim constructive dismissal, four conditions must be met:
>
> 1. There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;
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> 2. That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidence, *albeit* erroneous interpretation of the contract by the employer, will not be capable of constituting a repudiation in law; (In light of the economic crisis, and the reversible nature of the repeal of all other terms of the contract, this has not been met).
>
> 3. He must leave in response to the breach and not for some other, unconnected reason; and
>
> 4. He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract. (In light of the five month delay before the second respondent left the service of the applicant, he has delayed too long).

Second Respondent's Submission

[7] Learned counsel for the second respondent submits that the breach committed by the applicant show that the applicant no longer intended to be bound by its contract and thus, the second respondent was entitled to consider himself constructively dismissed.

[8] In urging this court not to disturb the award of the first respondent, learned counsel for the second respondent contends that the first respondent had made an objective examination of the factual matrix of the case, considered the credibility of the witnesses, had given its reasons supported with evidences and had considered the specific provisions of the law involved in arriving at the finding that the second respondent was dismissed from service without just cause or excuse.

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Finding Of The Court

The Law on Judicial Review

[9] Before discussing the submissions advanced by both parties, it is appropriate to state briefly the law on judicial review. As I understand it, in order for the judicial review application to succeed, the applicant must demonstrate that the Industrial Court's decision had been procured illegally, was irrational or unreasonable or had been subject to procedural impropriety. For example, when making the award, the Industrial Court took irrelevant matters into consideration or it fails to take relevant matters into consideration, or when its decision was perverse or unreasonable or when it acted on an incorrect basis of facts; or it acted on no probative evidence to support or when it gives a decision that militates against the object of the statue. (See *Council of Civil Service Unions v. Minister For the Civil Service* [1985] AC 374; *R Rama Chandran v.. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11; *Malayan Banking Bhd v. Association Of Bank Officers Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183; *Booi Kim Lee v. YB Menteri Sumber Manusia, Malaysia & Anor* [1999] 4 CLJ 121).

[10] With the liberalization of judicial review as stated above, it enable the reviewing court to review the decision or the Award of the Industrial Court, when the court breaches the duty to act judicially. However, it should be emphasized that the traditional supervisory role of the superior courts in judicial review proceedings had not, in any way, been abrogated and that the procedure should not be utilized as a cloak for what was essentially an appeal. For instance, the Court of Appeal in *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235, in relation to this issue, stated:

> It is well settled that a court cannot utilize *certiorari* proceedings as a cloak to entertain what, in truth, is an appeal against findings of fact. If authority is needed for that proposition, it may be found in the decision of the Indian Supreme Court in *Basappa v. Nagappa* AIR [1954] SC 440 and in *Dharangadhra Chemical Works Ltd v. State of Saurashtra & Others* AIR [1957] SC 264.

B C D E F G H I

[11] Likewise, in *Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh* [2000] 4 CLJ 77, the Court of Appeal elaborated further, in relation to when the High Court was entitled to intervene, in a judicial review application, on the question of review of facts:

> The authorities therefore establish a clear distinction between cases involving a review of facts as found by the Industrial Court based on the credibility of witnesses and those where no such exercise is involved. Cases where intervention has taken place, such as, *Rama Chandran (supra*) and those decisions that followed it fall into two categories. The first category comprises cases where what is undertake is an objective assessment of the reasonableness of the Industrial Court's decision based on the facts as found by the Industrial Court. The second are cases where the Industrial Court failed to have regard to the issues raised by the parties or took into account some irrelevant consideration in arriving at its conclusion, apart from any specific findings of fact based on the credibility of witnesses. But where the Industrial Court has accepted or rejected the evidence of a particular witness and gone on to make a finding based on such acceptance or rejection, the High Court is bound to accept such finding.

Issue To Be Determined By The Court

[12] The single issue to be determined in this application is simply this: whether the applicant by its acts and/or conducts had breached the fundamental terms that goes to the root of the second respondent's contract of employment by its unilateral decision to change the terms and condition of his employment.

Analysis

[13] I will begin by recalling the concept of Constructive Dismissal. The term "constructive dismissal" has been defined in numerous cases, to name but a few, are as follows:

(a) In *Western Excavating (E.C.C.) Ltd v. Sharp* [1978] 1 All ER 713 @ 717, His Lordship Lord Denning, MR defined the term 'constructive dismissal' and applied the contract test to be as follows:

> If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract,

A then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice saying B he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to C treat himself as discharged. He will be regarded as having elected to affirm the contract.

(b) The Supreme Court in *Western Excavating (E.C.C.) Ltd. v. Sharp* [1978] 1 All ER 713, Salleh Abas LP stated:

D We think the word 'dismissal' in this section should be interpreted in reference to the common law principle. Thus it would be dismissal if the employer is guilty of a breach which goes to the root of the contract or if he evinced an intention no longer to be bound by it. In such situations, the E employee is entitled to regard the contract as terminated and himself as being dismissed.

(c) In *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9, Gopal Sri Ram JCA (as he then was) stated:

F Constructive dismissal can take place as we have attempted to demonstrate in a number of cases. Since human ingenuity is boundless, the categories in which constructive dismissal can occur are not closed. Accordingly, a single act or a series of acts may according to the particular and peculiar circumstances of the given case, amounts to a constructive G dismissal. There are cases which fall as illustrations at either end of the spectrum.

At page 19:

H An employer does not like a workman. He does not want to dismiss him and face the consequences. He wants to ease the workman out of his organization. He wants to make the process as painless as possible for himself. He usually employs the subtlest of means. He may, under the guise of exercising the management power of transfer, demote the I workman. That is what happened in Wong Chee Hong. Alternatively, he may take steps to reduce the workman in

> rank by giving him fewer or less prestigious responsibilities than previously held. Generally speaking, he will make life so unbearable for the workman so as to drive the latter out of employment. In the normal case, the workman being unable to tolerate the acts of oppression and victimization will tender his resignation and leave the employer's services. The question will then arise whether such departure is voluntary resignation or a dismissal in truth and fact.

Burden To Prove Constructive Dismissal

[14] It is trite law in a claim of constructive dismissal, the burden of proof lies on the employee on a balance of probabilities. (*Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor* [1998] 1 LNS 258). In doing, so the second respondent must prove:

i) The applicant, by its conduct, had breached a term of his contract of employment or had evinced an intention no longer to be bound by it;

ii) The breach is a fundamental that goes to the root of the contract;

iii) He left in response to that breach and not for some unconnected reason; and

iv) He did not unreasonably delay in terminating the contract of employment otherwise he may be deemed to have waived the said breach.

[15] The rule is that one who alleges a fact has the burden of proving it; thus the second respondent was burdened to prove his allegation that he was constructively dismissed. The rule that employer (the applicant) bears the burden of proof to justify a dismissal finds no application here because the applicant denies that the dismissal has taken place. In such a situation, we must bear in mind a legal dictum that, he who asserts, not who denies, must prove.

[16] In *Selangor Medical Centre v. Zainal Abidin Md Tamami* [2002] 2 ILR 527, the Industrial Court held:

> There is no convincing evidence offered by the claimant to prove that the Company had failed the contract test or had repudiated the contract of employment. The claimant is not able to discharge the burden of proof which is on him to prove, on a balance of

A probabilities, that the company, as the employer, had been guilty of any fundamental breach which goes to root of the contract or that the company had evinced any intention of no longer to be bound by it. As such, the claimant is not entitled to regard his contract of employment as being terminated or that he was constructively dismissed.

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[17] In the award, the learned chairman said:

> Based on the above, it is the court's finding that the company has not succeeded in proving, on the balance of probabilities, that the claimant had been dismissed with just cause as excuse. As such, it is the court's finding that the claimant had been dismissed without just cause or excuse.

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[18] In my respectful view, the learned chairman had made an error in imposing a burden of proof on the applicant that the second respondent had been dismissed with just cause or excuse. As I understand it, there is a two stage inquiry into constructive dismissal that the Industrial Court must take. The court must first decide whether there has been a dismissal which requires the employee to prove that the employer's conduct led him to terminate the employment relationship. If the employee discharges this burden of proof, the employer is required to call the relevant evidence to rebut that the dismissal was for just cause and excuse. This does not necessarily means that a burden was placed on the employer to prove, on balance of probabilities, that the claimant had been dismissed with just cause or excuse.

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[19] Even if I am wrong on the issue of burden, I take the view that for a complaint of constructive dismissal to succeed, it is essential that the employee should act with promptness. It is fatal to a claim based on constructive dismissal if there is undue delay in responding to the changes that were imposed by the employer or generally, in reacting to the repudiatory conduct of the employer. There is no dearth of authorities in support of the prerequisite to act without delay. See *Pexxon Sendirian Berhad And Sia Qui Yau, Johore* [1989] 2 ILR 235, *Diethelm Malaysia Sdn. Bhd. v. Choong Pak Choy* [1997] 2 ILR 423, *Bayer (M) Sdn Bhd v. Anwar Abd Rahim* [1996] 2 CLJ 49, *Medicplas Industries Sdn Bhd v. Eldophol Pereiara*, *Hunt v. British Railway Board* [1979] IRLR 295 and *Kontena Nasional Bhd v. Hashim Abd Razak* [2000] 8 CLJ

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274. Hence, the learned chairman of the Industrial Court's failure to consider the law and apply it accordingly constitutes an error of law and a failure to consider relevant considerations and instead considering irrelevant considerations.

[20] In this instant case, the second respondent did not repudiate the contract in October 1997. Instead, he affirmed and accepted it for five months, his affirmation of the variation must be deemed complete. The letter dated 12 February 1998, merely formalizes the practice over the past five months, of paying salary on an hourly rated basis. Therefore, since the second respondent did not act immediately to repudiate his contract, his action must be viewed as his electing to accept the variation.

[21] Concerning the letter giving notice of constructive dismissal, it was only after the second respondent's claim was before the Industrial Court six years later that the applicant was notified of the second respondent's repudiation of the contract and claim of constructive dismissal. The applicant never received the second respondent's letter of repudiation dated 20 March 1998 until the statement of case filed and served on them.

[22] In *Southern Bank Bhd v. Ng Keng Lian & Anor* [2002] 2 CLJ 514, the following question was before the High Court:

> Is an employee, who considers herself as having been constructively dismissed obliged to first inform her employer or put her employer on notice of her stand (that she has been so dismissed) before she can make a representation under section 20(1) of the Industrial Relations Act 1967 ("the IRA") read with section 20(1A) of the IRA?

[23] The High Court held that the Industrial Court, had been wrong to answer the issue in the negative when it decided that an employee is not required to inform her employer that she considered herself as having been constructively dismissed. It said that if the Industrial Court was correct in view:

> then any employee can walk out of employment for whatever reasons (eg, for a better job) without first informing her employer or giving notice to her employer and then when things do not go the employee's way, the employee can say that he or she was in fact constructively dismissed by the employer. This would be an abuse of a claim of constructive dismissal. Equally, as the case

A before the court here, an employee faced with serious allegations of misconduct could give the impression that she is submitting to the disciplinary process of the employer. But at the same time, she could make a representation under the IRA that she has been constructively dismissed by reason of the disciplinary process, without first informing her employer of her stand. It is only when she finds that the disciplinary action is not going her way that she informs her employer that she considers herself as having been constructively dismissed and that she had already made her representation. This is also an abuse of a genuine claim of constructive dismissal.

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[24] The High Court referred to several decisions in support of the correctness of applying the contract test in cases of constructive dismissal and proceeded to reason that it would therefore follow that it was necessary to inform the employer by D words or conduct that she was accepting the repudiation and treating the contract of employment as having been terminated. English cases in support of this principle such as *Holland v. Glendale Industries Ltd* [1998] ICR 493 and *Edwards v. Surrey Police* [1999] IRLR 456 were relied on in addition to *Moo Ng v. Kiwi Products* E *Sdn Bhd Johor & Anor* [1998] 3 CLJ 475.

[25] It is also relevant at this juncture to highlight the fact that the applicant had just cause for the conversion of salary. The learned chairman of the Industrial Court had failed to take account F of the facts that the second respondent had stopped coming to work regularly by the time the letter was issued. The applicant did not take an extreme position *vis-a-vis* the second respondent's absenteeism. The applicant's Managing Director did not confine herself to the two extremes of either silent endorsement of all the G second respondent's absenteeism or dismissal. The applicant gave him credit where it was due by the payment of the discretionary bonus and took action for his shortcomings by way of a warning and the reduction in monthly salary.

[26] COW1 testified that in her mind, dismissal was the worst H thing to do to an employee and in her twenty years she had never done it. She issued him with the warning letter dated 11 September 1997. This was also the time during which he was paid the initial RM80,000. The claimant responded to this letter with his appeal for the balance RM70,000 and explanation dated I 31 October 2009 given the second respondent's family and

financial problem, COW1 had hoped to rehabilitate the second respondent. With effect November 1997, the second respondent was confirmed in his position. The letter of confirmation included a title change, a raise of RM2000 and a provision for the above incentive scheme.

[27] Not long after the second respondent was paid a further RM50,000 in incentives, COW1 also attempted to renegotiate the second respondent's terms and conditions of service. His poor performance and the economic crisis were both driving factors behind the need to do something about the second respondent. This is clear from the letter dated 31 October 1997 and in February of 1998. In any event, the hourly rate amendment to the second respondent's salary would have returned a salary in excess of the second respondent's previously expressed contractual monthly salary if the second respondent had attended work. It is in fact titled "Review of Salary" and expresses that the variations are reversible and are due to the current economic crisis.

[28] The court should be mindful of the fact that every business strives to keep afloat during these times when prevailing economic situations turns such endeavour into a near struggle. With as much latitude as our laws would allow, the court has always respected a company's exercise of its prerogative to devise means to improve its operations. Thus, courts have held that management is free to regulate, according to its own discretion and judgment, all aspects of employment, including hiring, work assignments, working methods, time, place and manner of work, processes to be followed, supervision of workers, working regulations, transfer of employees, work supervision, lay off of prerogative, whenever exigencies of the service so require, to change the working hours of its employees.

[29] Concerning the repeal of the incentive sharing scheme, it must be highlighted that the question of the conversion from monthly to hourly rate on the one hand, and the payment of incentives, on the other hand are two separate issues. The repudiation of the contract in respect of these issues must be considered separately rather than cumulatively. Based on the term in the letter of confirmation effective 1 November 1997, if a project is not profitable there will be no incentive whilst a very profitable project may generate bigger incentives. The scale of the

A incentive is also provided at 1% of the project value. In effect therefore this again there were contradicting testimony of what exactly the agreed terms of the incentive sharing scheme and the first respondent erred in law, admitting extrinsic oral evidence of the terms of a contract.

B

[30] The applicant had paid the second respondent a total of RM130,000 in three parts – the last of which was in early 1998 – in appreciation of the second respondent's contribution towards the successful completion of the demanding KLSE project. The C second respondent admitted in his testimony that the KLSE project was valued at 5 million. Yet due to his own erratic attendance and anxiety over the incentive sharing scheme, his attendance and performance became questionable. If he who comes to equity must come with clean hands, then certainly, the D second respondent must be prevented from obtaining a remedy from the first respondent, the Court of Equity and Good Conscience. The ongoing economic crisis resulted in no projects being secured and therefore no incentives to be shared. In the circumstances what exactly was the breach being complained of? E The provision in the letter of confirmation is nothing but a conditional promise. Its fulfilment is dependent on conditions precedent which did not materialize. Therefore, when the first respondent found that the appeal of the incentive provision was a serious and fundamental breach, it failed to take into account of F relevant considerations and misdirected itself. The second respondent in fact has no claim that he can substantiate because he suffered no loss on account of his own premature abandonment of the contract.

G

Conclusion

[31] I take the view that the application has merits, and order of *certiorari* to quash the award must be allowed with costs.

H

I